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78-1876

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-

DEL RIO DISTRIBUTORS, INC.,
Petitioner,

v.

ADOLPH COORS COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Del Rio Distributors, Inc., petitions for writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The District Court wrote no opinion in this case. The opinion of the United States Court of Appeals for the Fifth Circuit is annexed hereto as Appendix A and is reported at 589 F.2d 176.

JURISDICTION

The Judgment of the Court of Appeals was entered on February 6, 1979, and is annexed hereto as Appendix B. A timely Petition for Rehearing and Rehearing En Banc was denied on May 7, 1979, by order annexed as Appendix C. The jurisdiction of this Court is invoked under 28 U.S.C., §1254(1).

QUESTION PRESENTED

Whether a restraint of trade (vertical territorial restriction) imposed by a manufacturer upon its distributor, wholly within the boundaries of a state, can be reasonable under the Sherman Act rule of reason, when such restraint constitutes a per se felony violation of the antitrust law of the state wherein it is imposed; or, whether same must be unlawful as a matter of law.[1]

STATUTES INVOLVED

The relevant provisions of the 21st Amendment to the Constitution and of Section 1 of the Sherman Act, §1, 26 Stat. 209 (1890), 15 U.S.C. §1, involved in this case, are set forth in Appendix D. The relevant provisions of the Texas Constitution and Texas antitrust statutes involved in this case, Article 1, §26 Constitution of the State of Texas, and Sections 15.01, 15.02, 15.03, 15.04, and 15.33 of the Texas Business and Commerce Code, in effect from September 1, 1967, and Articles 7426, 7427, and 7428, Vernon's Annotated Civil Statutes of the State of Texas, in effect prior to September 1, 1967, are set forth in Appendix E.

STATEMENT OF THE CASE

Petitioner, Plaintiff below, Del Rio Distributors,

[1] Subsidiary to this question is the further question whether the federal antitrust laws preempt state antitrust laws concerning a restraint of trade imposed wholly within the state in question and, if so, whether that preemption still obtains over commerce in alcoholic beverages in view of the 21st Amendment to the Constitution.

Inc. (Del Rio), commenced business in December, 1966, as the exclusive distributor for the Respondent, Defendant below, Adolph Coors Company (Coors), in ten Texas counties, including and surrounding Del Rio, Texas. Coors brewed its beer in Colorado and shipped it to Del Rio in Texas.

It is undisputed that, while Del Rio served as Coors' distributor, and until terminated as such by Coors, Del Rio was restricted by Coors to wholesaling its beer solely within its designated ten county area of Texas. Coors beer had not been distributed in Del Rio's territory prior to its commencement of business in that area. Del Rio, in plowing the virgin soil for Coors beer, operated at a loss until the year 1971, when it first showed a profit. At that time, Coors notified Del Rio that it was to be terminated as its distributor, which termination finally became effective December 1, 1971, at which time Del Rio went out of business.

This action was instituted by Del Rio against Coors in the United States District Court for the Midland-Odessa Division of the Western District of Texas, on April 26, 1972. In its complaint, Del Rio claimed treble damages under the Clayton Act for violations of Section 1 of the Sherman Act by Coors in imposing vertical territorial restrictions upon it, fixing its prices and wrongfully terminating Del Rio as its distributor to insure enforcement of its territorial restrictions and price-fixing activities.

Del Rio's original complaint contained a pendent claim under the antitrust laws of the State of Texas. This pendent claim was abandoned by Del Rio in the pre-trial order, dated February 25, 1977, to induce

Coors to agree to its entry.[2] Del Rio further moved the District Court to take judicial notice of the rulings in *Copper Liquor, Inc.* v. *Adolph Coors Company* and *Adolph Coors Company* v. *Federal Trade Commission*, 497 F. 2d 1178, cert. den. 419 U.S. 1105, wherein it was decided that Coors' territorial restrictions were a per se violation of the Sherman Act and that it had further violated that Act in imposing retail and wholesale price-fixing. The pre-trial order presented Del Rio's contention that Coors' territorial restrictions constituted a per se violation and that Coors was further collaterally estopped on the question of liability under the decisions in *Copper Liquor* and the *F.T.C.* cases.

After having prepared for trial for some five years under the settled law that territorial restrictions were per se illegal, Del Rio proceeded to trial before a jury in Midland, Texas, on the 20th day of June, 1977. Del Rio rested its case on June 23, 1977, the same day this Court handed down its ruling in *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (1977), overruling the per se *Schwinn* rule and reinstating the "rule of reason" under the Sherman Act for territorial restraints.

[2] Although it has long been clearly decided that territorial restrictions constituted a per se violation of the Texas antitrust laws, the Texas law allowed only single rather than treble damages, and, in view of the Fifth Circuit's ruling in *Copper Liquor, Inc.* v. *Adolph Coors Company*, 506 F.2d 934, wherein it was held that under the rule of *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365, 87 S. Ct. 1856, 18 L. Ed. 2d 1249 (1967), territorial restrictions were a per se violation of the Sherman Act, Del Rio saw nothing to be gained by insisting upon a continuance of its pendent claim under the Texas antitrust laws.

After, and in view of, this Court's ruling in *Sylvania*, Del Rio sought to enlarge the pre-trial order to reinstate its pendent claim under the Texas antitrust laws, which was denied by the District Court. Del Rio submitted its memorandum brief to the District Court on the question that territorial restrictions were a per se violation of the Texas antitrust laws. Del Rio also sought jury instructions in connection with the Court's charge on the rule of reason to the effect: (Pltf. Req. Inst. No. 28) that Coors' territorial restrictions were a per se violation of the antitrust laws of the State of Texas; and (Pltf. Req. Inst. No. 34) that if Coors employed its territorial restrictions as an aid to enforce price-fixing activities, that such would be unreasonable as a matter of law.[3] These requested jury instructions were refused by the trial court. Del Rio also asked that interrogatories posed to the jury, inquiring whether or not Coors fixed prices or that its territorial restrictions were unreasonable, be submitted to the jury unconditionally. However, the District Court submitted them only conditioned upon the jury's bringing in a general verdict for Del Rio in the first instance.

After a general verdict for the Defendant, Coors, Del Rio moved for judgment n.o.v., on the ground that Coors' territorial restrictions were per se illegal under the Sherman Act as being in violation of the Texas antitrust laws and, secondly, on the ground that Coors was collaterally estopped under the *Copper Liquor* and *F.T.C.* decisions. Alternately, Del Rio

[3] William Kisler Coors, Coors' highest officer, testified that a purpose of the territorial restrictions was to insure that Coors' pricing structures were adhered to. (Tr., Vol. II, pp. 135, Coors Dep., pp. 20, 21.)

moved for a new trial, upon the grounds, among many others, that it should be granted a new trial in the interest of fairness and justice to permit it to prepare and present its case under the rule of reason, in view of the fact that the law had been changed on Del Rio in the middle of the trial and without opportunity to prepare and present a rule of reason case. These motions were denied.

Upon appeal to the Fifth Circuit, Del Rio presented, as its first and primary point, the contention that, since Coors' territorial restrictions constituted a per se felony violation of the Texas antitrust laws, same must be unreasonable as a matter of law and a per se violation of the Sherman Act. The Court of Appeals overruled this, as well as Del Rio's other points on appeal, and affirmed the District Court's take nothing judgment against Del Rio in an opinion completely ignoring and avoiding any reference to the fact that Del Rio's primary contention on appeal was that Coors' territorial restrictions must be unreasonable and illegal per se as violative of the Texas antitrust laws and the public policy of the State of Texas. Del Rio's Petition for Rehearing was overruled without opinion by the Court of Appeals.

REASONS FOR GRANTING THE WRIT

Whether a restraint on trade can or cannot be reasonable under the Sherman Act rule of reason, when same is a per se violation of the state antitrust law wherein it is imposed, is an important question of federal law which has not been, but should be, settled by this Court.

It is, and has been, long and well decided in the

State of Texas that vertical territorial restrictions imposed therein upon a distributor by a manufacturer are per se violations of the Texas antitrust law.[4] Article 1, §26, Constitution of the State of Texas; Sections 15.01, 15.02, 15.03, 15.04, and 15.33, Texas Business and Commerce Code; *Patrizi* v. *McAninch* (Tex. Sup. Ct., 1954) 296 S.W. 2d 343; *Ford Motor Co.* v. *State* (Tex. Sup. Ct., 1943) 175 S.W. 2d 230; *W. T Raleigh Co.* v. *Land* (Tex. Sup. Ct., 1926) 279 S.W. 810; *E.F.I., Inc.* v. *Marketers Intern., Inc.* (Tex. Civ. App., 1973) 492 S.W. 2d 302, ref'd. n.r.e. 506 S.W. 2d 579; *Jackson Brewing Co.* v. *Clarke* (Tex. Civ. App., 1964) 375 S.W. 2d 352, ref'd. n.r.e.; *Kelly* v. *Bryson Pipeline & Refining Co.* (Tex. Civ. App., 1942) 163 S.W. 2d 413; *Byrd* v. *Crazy Water Co.* (Tex. Civ. App., 1940) 140 S.W. 2d 334; *Burpee Tan Sealer Co.* v. *Henry McDonnell Co.* (Tex. Civ. App., 1934) 75 S.W. 2d 458, err. ref.; *Newby* v. *W. T. Raleigh Co.* (Tex. Civ. App., 1917) 194 S.W. 1173.

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[4] Coors conceded this in its response to Del Rio's Petition for Rehearing, wherein it stated, at page 9, "The Texas cases and the state statutory provision cited by Del Rio *** seem to imply that all territorial restrictions violate the Texas antitrust laws and constitute a felony." Thereafter, Coors cited as an exception to this rule, §102.51 of the Texas Alcoholic Beverage Control Act (the provisions of which are set forth in Appendix F), which require manufacturers of beer products to designate territorial limits for their distributors. However, this Act was not enacted until 1975, almost four years after Del Rio was terminated as a Coors distributor and accordingly, has no application herein. In any event, even were it applicable, such Act would grant no refuge to Coors, since, by its terms, such territorial limits must be "non-exclusive," whereas the territorial restrictions established by Coors, granted to Del Rio, and each of its other distributors, an exclusive franchise to distribute within their designated territory.

Since the Court of Appeals failed to make any reference to this point in its opinion (as though it did not exist) it naturally stated no reason why such point was overruled. The Fifth Circuit did, however, make reference to the fact that Del Rio abandoned its pendent claim under the Texas antitrust laws. Nevertheless, Del Rio did not waive any effect that the Texas antitrust laws may have upon the Sherman Act under the rule of reason. Rather, the same was timely and properly brought to the attention of the District Court by trial brief and requested jury instructions, during the trial, and by motion for judgment n.o.v. after the jury verdict.

In the Fifth Circuit, Coors did advance the argument that the Texas antitrust laws had been preempted by the federal antitrust laws. It is hard to believe that the Court of Appeals followed this reasoning, since that circuit had expressly held, in *Woods Exploration & Pro. Co.* v. *Aluminum Co. of Amer.* (5th Cir., 1971) 478 F. 2d 1268, cert. den. 423 U.S. 833, that the federal laws did not preempt the state, and that both complemented each other. The same conclusion was reached earlier in *Mathews Conveyor Co.* v. *Palmer-Bee Co.* (6th Cir., 1943) 135 F.2d 73; *McKinney* v. *Landon* (8th Cir., 1913) 209 F. 300. So far as Del Rio can determine, this Court has never expressly ruled on this point, but its decision in *Standard Oil Co. of Kentucky* v. *Tennessee* (1910) 217 U.S. 413, 30 S. Ct. 543, 54 L. Ed. 817, has declared that the federal government has not preempted the right of state governments to regulate trade and commerce within their boundaries. Likewise, the Texas courts have uniformly held that the federal did not preempt the state antitrust laws. *Elray, Inc.* v. *Cathodic Protection Service* (Tex. Civ. App., 1974) 507 S.W. 2d 570; *E.F.I., Inc.* v. *Marketers Intern., Inc.*, supra.; and *State* v. *Southeast Tex. Chap. of Nat. Elec. Con. Ass'n* (Tex. Civ. App., 1962) 358 S.W. 2d 711, ref'd. n.r.e., cert. den. 372 U.S. 965. In any case, if such preemption existed generally, it should not apply here where the field of commerce concerns alcoholic beverages, the regulation of which has been left to the states by the 21st Amendment, as held in *Lamp Liquors, Inc.* v. *Adolph Coors Company* (D.C., Wy., 1976) 410 F. Supp. 536, reversed on other grounds, 563 F. 2d 425; *Fairfield County Beverage Distributors, Inc.* v. *Narragansett Brewing Company* (D.C., Conn., 1974) 378 F. Supp. 376. This Court repeatedly has held that the states are unconfined in the regulation of intoxicants within their borders. *Joseph E. Seagram & Sons* v. *Hostetter* (1966) 384 U.S. 35, 86 S. Ct. 1254, 16 L. Ed. 2d 336, and cases cited therein at page 42, 384 U.S.

Furthermore, there is nothing inconsistent between Texas' antitrust prohibition against territorial restraints and Section 1 of the Sherman Act as interpreted by this Court. In fact, from 1967, when this Court adopted the *Schwinn* rule, until 1977, when it made its *Sylvania* ruling, the law of both jurisdictions condemned territorial restraints as per se violations. Certainly, the *Sylvania* ruling did not hold that territorial restrictions were per se legal, but rather, held that the legality of same must be judged by the rule of reason. Therefore, Del Rio submits that the overruling of this point by the Court of Appeals cannot be sustained on any theory of federal preemption.

In deciding the legality of a territorial restriction under the rule of reason, as we must under *Sylvania*,

we must look at the particular facts and circumstances of the particular case under review. Del Rio submits that the fact and circumstance that the conduct under scrutiny constitutes a per se felony violation of the Texas antitrust laws must predominate so as to render these restrictions unreasonable and illegal per se under the Sherman Act. In applying a federal rule that has no federal standard engrafted upon it to give it certainty, such as a rule of reason inquiry, one should look to the state law to determine the state standard, as this Court has recently done in *Burks* v. *Lasker* (May 14, 1979) ___ U.S. ___ and *U.S.* v. *Kimbell Foods, Inc.* (April 2, 1979) ___ U.S. ___, 99 S. Ct. 1448, 59 L. Ed. 2d 711.

The irrefutability and correctness of Del Rio's contention, that Coors' territorial restrictions must be per se illegal under the rule of reason when same constitute a per se felony violation of the state antitrust laws, is most glaringly demonstrated by the fact that the Court of Appeals, in overruling Del Rio's contention, was totally unable to express any justification for its action and was compelled to write its opinion as though this point was not even in the case, even though it was the first and primary point urged on appeal and the main one addressed on oral argument and pointed out upon rehearing before the Court of Appeals. The conduct of the Court of Appeals, in attempting to ignore Del Rio's primary point before it, more closely fits the rule of men, than the rule of law.

To hold that it was reasonable under the federal antitrust law to commit a restraint of trade that was a per se felony violation, in the state where committed, of the very law of that state designed to prevent restraints of trade in commerce, would undoubtedly be one of the most preposterous decisions handed down in our language.

The dignity and efficacy of the antitrust laws of every state in the Union weigh in the balance of this appeal.

CONCLUSION

This petition for writ of certiorari should be granted to decide this important Sherman Act question and in the interest of justice.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

No. 77-2811

DEL RIO DISTRIBUTING, INC.,
Plaintiff-Appellant,

v.

ADOLPH COORS COMPANY,
Defendant-Appellee.

Appeal from the United States District Court for the Western District of Texas.

Before GEWIN, RONEY and GEE, *Circuit Judges.*

GEWIN, *Circuit Judge:*

Del Rio appeals from the jury's finding that Coors had not violated the Sherman Act. Appellant raises several issues for review. First, the refusal of the trial court to enlarge the pretrial order by adding a count based on alleged state antitrust violations. Second, the court's refusal to grant a new trial because of a change in the applicable law during trial or because the verdict was against the weight of the evidence. Third, appellant contends that the doctrine of collateral estoppel should apply to the issue of liability. Finally, appellant cites the court's refusal to give certain special instructions that it had requested. After carefully viewing the voluminous record, we find no merit in the issues raised. The decision is affirmed.

In 1972, appellant Del Rio initiated a suit against the Adolph Coors Company alleging violations of the Sherman

Act and Texas antitrust laws. The alleged violations were the fixing of wholesale and retail prices and the limiting of territories where Coors beer could be resold. Del Rio had begun operation as a distributor of appellee's beer in Del Rio, Texas in December, 1966 and continued until Coors terminated the distributorship and it went out of business on December 1, 1971. Appellant sought damages for lost profits that it alleged would have been gained by the freedom to sell the beer without territorial and price restrictions and for loss of value of a going concern or goodwill by reason of being terminated by appellee to ensure enforcement of those restrictions.

On October 7, 1975, a Pre-Trial Conference was held, and shortly thereafter a Pre-Trial Order was submitted indicating that Del Rio was abandoning its claims under the Texas antitrust laws. The claim was expressly abandoned in the final Amended Pre-Trial Order in 1977.

The trial was commenced on June 20, 1977 with appellant presenting its case under the territorial per se *Schwinn* Rule.[1] On June 23 Del Rio rested its case. That same day the Supreme Court handed down *Continental T. V. Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 97 S.Ct. 2549, 53 L.Ed.2d 568 (1977), overruling the *Schwinn* per se rule and reinstating the "rule of reason." Thereafter, appellant moved to amend the Pre-Trial Order in an effort to reinstate its claim under the Texas antitrust laws.[2] The court denied this motion. The jury returned the verdict for appellee Coors and appellant filed motions for Judgment N.O.V. or alternatively for a new trial. Del Rio appealed

[1] *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 87 S.Ct. 1856, 18 L.Ed.2d 1249 (1967).

[2] During oral argument, in response to a question by the court, counsel for appellant stated that he did not move to reopen his case after *Sylvania* was decided because he did not have sufficient time to prepare a rule of reason case. Appellant also did not move for a continuance.

from the denial of those motions.

Appellant contends that the court erred in refusing to allow the pretrial order to be enlarged to add a count based on Texas antitrust violations. This court has previously recognized that the trial judge is vested with broad discretion in determining whether or not a pre-trial order should be modified or amended. In *Sherman v. United States*, 462 F.2d 577, 579 (5th Cir. 1972) the court stated:

> The trial judge is vested with broad discretion to preserve the integrity and purpose of a pre-trial order. Basically, these orders and stipulations, freely and fairly entered into, are not to be set aside except to avoid manifest injustice.

This position is consistent with the relevant language in Rule 16 of the Federal Rules of Civil Procedure.

Del Rio does not dispute that it clearly waived any claim that it might have had under Texas antitrust laws. The facts necessary to support Del Rio's claim under the Texas antitrust laws could have been discovered prior to the Pre-Trial Conference. However, appellant chose to abandon its claim under Texas antitrust laws and has failed to establish that the trial court abused its discretion. *Bettes v. Stonewall Insurance Co.*, 480 F.2d 92 (5th Cir. 1973).

As a corollary to appellant's contention that the court should have enlarged the pre-trial order, appellant also contends that the court erred in refusing to grant a new trial. Again Del Rio's argument is based on its reliance that the decision would be rendered under the *Schwinn* per se doctrine and in line with *Copper Liquor, Inc. v. Adolph Coors Co.*, 506 F.2d 934 (5th Cir. 1975).

Under Rule 59(a) of the Federal Rules of Civil Procedure a new trial may be granted where the action has been tried by a jury "for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of

the United States."

The only authority the appellant cites for its position is *Hampton v. Graff Vending Co.*, 516 F.2d 100 (5th Cir. 1975) where this circuit remanded that case because of a change in the law of this circuit between the first and second appeals. In contrast, the change in the law in the instant case occurred during the trial because of a decision of the Supreme Court. Although, on its face, a remand might appear more compelling, there are several factors that distinguish the case at bar from *Hampton*.

First, appellant made a voluntary waiver of any claim it might have had based on any alleged state antitrust violations. This waiver occurred after the Supreme Court had granted certiorari in the *Sylvania* case. Thus, the argument of surprise carries less weight. Finally, appellant has failed to establish that any manifest injustice occurred because of the continuation of the trial.[3]

Del Rio contends that adverse judgments entered against Coors in *Adolph Coors Co. v. Federal Trade Commission*, 497 F.2d 1178 (10th Cir. 1974), and *Copper Liquor, Inc. v. Adolph Coors Co.*, 506 F.2d 934 (5th Cir. 1975) serve as collateral estoppel on the issue of liability.[4] We disagree and find several bases for distinguishing those cases. One of the most obvious distinctions of *Copper Liquor* is that it was decided under the per se rule of *Schwinn* that has now been replaced by the rule of reason under *Sylvania*.

[3] In commenting on Rule 59, Wright and Miller has observed:

> Rule 59 gives the trial judge ample power to prevent what he considers to be a miscarriage of justice. . . . Courts do not grant new trials unless it is reasonably clear that prejudicial error has crept into the record or that substantial justice has not been done, and the burden of showing harmful error rests on the party seeking the new trial. Ultimately the motion invokes the sound discretion of the trial court, and appellate review of its ruling is quite limited.

11 Wright & Miller, Federal Practice & Procedure § 2803, at 31-33 (3d ed. 1973).

The F.T.C. case, decided in another circuit, was based on an appeal of an F.T.C. cease and desist order brought under § 5 of the Federal Trade Commission Act. The Federal Trade Commission had over-turned the decision of an administrative law judge who had found no violation of the act. In reaching its decision on vertically imposed territorial restrictions, the Tenth Circuit was compelled to rely on law in effect at that time; the *Schwinn* per se rule.

In light of the reliance on *Schwinn* in both *Copper Liquor* and the F.T.C. case we hold that the doctrine of collateral estoppel has no application in the instant case.

Del Rio further argues that the verdict was against the weight of the evidence. However, a perusal of the records reveals that there was ample evidence from which the jury could have reasonably concluded that Coors' territorial restrictions were reasonable and that Coors did not engage in retail and wholesale price fixing.

Several witnesses testified that territories were essential to maintaining quality control and service in the retail market. There was a good deal of testimony concerning Coors' unique brewing process and the necessity for refrigeration and regular stock rotation to ensure quality and flavor maintenance. Also, one of the expert witnesses testified that by assigning exclusive distributorships, there was a long-term effect of making each distributorship stronger, better able to compete with other brands and provide better service. While appellee concedes that the

[4] We also find that the trial judge did not err in refusing to take judicial notice of *Adolph Coors Co. v. Federal Trade Commission*, 497 F.2d 1178 (10th Cir. 1974) or in refusing to enter into evidence the F.T.C. Complaint and the F.T.C. Cease and Desist Order. Trial Record Vol. IV, pp. 235-37.

evidence related to price fixing is sharply divided, there was testimony upon which the jury could have concluded that Coors was not guilty of price fixing.

The final allegation of Del Rio relates to the court's refusal to give to the jury certain special instructions requested by appellant and the use of two general verdict forms and four interrogatories to be answered in the event a verdict was returned for Del Rio. A careful scrutiny of the entire jury charge establishes that the jury was properly advised on the applicable law. The use of interrogatories in conjunction with general verdict forms is consistent with Rule 49(b) of the Federal Rules of Civil Procedure. Thus, we find no merit in Del Rio's allegations of error.

Having carefully considered each of the issues raised on appeal and finding no merit in them, the judgment is AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS

No. 77-2811

D. C. Docket No. MO-72-CA-34

DEL RIO DISTRIBUTING, INC.,

Plaintiff-Appellant,

v.

ADOLPH COORS COMPANY,

Defendant-Appellee.

Appeal from the United States District Court for the Western District of Texas

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Before GEWIN, RONEY and GEE, *Circuit Judges.*

Judgment

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It if further ordered that the plaintiff-appellant pay to the defendant-appellee the costs on appeal, to be taxed by the Clerk of this Court.

February 6, 1979

APPENDIX C

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

OFFICE OF THE CLERK

May 7, 1979

TO ALL PARTIES LISTED BELOW:

No. 77-2811 - Del Rio Distributing, Inc. vs. Adolph Coors Co.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition ( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the petition ( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH, *Clerk*

By Rosalie C. Vasino /s/
Deputy Clerk

APPENDIX D

Relevant provisions of the 21st Amendment to the Constitution of the United States:

> "Sec. 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

Relevant provisions of Section 1 of the Sherman Act, §1, 26 Stat. 209 (1890), 15 U.S.C. §1:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

APPENDIX E

Article 1, Section 26, of the Texas Constitution provides:

> "Perpetutities and monopolies are contrary to the genius of a free government, and shall never be allowed, nor shall the law of primogeniture or entailments ever be enforced in this State."

Texas Business And Commerce Code (Effective September 1, 1967)

Section 15.01. Monopoly Defined

A "monopoly" is a combination or consolidation of two or more corporations effected by

(1) bringing the direction of their affairs under common management or control to create, or where the common management or control tends to create, a trust as defined in Section 15.02 of this code; or

(2) one corporation acquiring (in whole or part and whether directly, through trustees, or otherwise) the stock, bonds, franchise or other rights, or physical property of one or more other corporations to prevent or lessen, or where the acquisition tends to prevent or lessen, competition.

(R.S. Art. 7427; P.C. Art. 1633.)

Acts 1967, 60th Leg., vol. 2, p. 2343, ch. 785, § 1.

§15.02. Trust Defined

(a) In this section, unless the context requires a different definition, "person" does not include municipal corporation. (No source citation.)

(b) A "trust" is a combination of capital, skill, or acts by two or more persons to

(1) restrict, or tend to restrict, trade, commerce, aids to commerce, the preparation of tangible personal property for market or transportation, or the free pursuit of a lawful business; or

(2) fix, maintain, increase, or reduce the price of tangible personal property, the cost of insurance, or the cost of preparing tangible personal property for market or transportation; or

(3) prevent or lessen competition in

(A) the manufacture, transportation, sale, or purchase of tangible personal property;

(B) the business of insurance;

(C) aids to commerce; or

(D) preparing tangible personal property for market or transportation; or

(4) affect, control, or establish the price of tangible personal property, or the cost of transportation, insurance, or preparing tangible personal property for market or transportation; or

(5) agree

(A) not to sell, dispose of, transport, or prepare tangible personal property for market or transportation, or not to make an insurance contract, at a price below a common standard or figure;

(B) to maintain the price of tangible personal property, the charge for transportation or insurance, or the cost of preparing tangible personal property for market or transportation at a fixed or graded figure;

(C) to affect or maintain the price of tangible personal property or the cost of transportation, insurance, or preparing tangible personal property for market or transportation in order to

preclude free competition between or among themselves or others in the sale or transportation of tangible personal property, in the business of transportation or insurance, or in preparing tangible personal property for market or transportation; or

(D) to pool, combine, or unite an interest they have in the sale or purchase of tangible personal property, or in the charge for transportation, insurance, or preparing tangible personal property for market or transportation, so that the price of the tangible personal property, or charge for transportation, insurance, or preparing tangible personal property for market or transportation, might be in any manner affected; or

(6) regulate, fix, or limit the output of tangible personal property, or the amount of insurance undertaken, or the amount of work performed in preparing tangible personal property for market or transportation; or

(7) refrain from engaging in business, or from buying or selling tangible personal property, partially or entirely in this state.

(R.S. Art. 7426; P.C. Art. 1632)

Acts 1967, 60th Leg., vol. 2, p. 2343, ch. 785, § 1.

§15.03. Conspiracy in Restraint of Trade Defined

(a) It is a conspiracy in restraint of trade for

(1) two or more persons engaged in buying or selling tangible personal property to agree not to buy from or sell to another person tangible personal property;

(2) two or more persons to agree to boycott, or threaten not to buy from or sell to, a person because that person buys from or sells to another person; (R.S. Art. 7428, subdiv. 1 and 2; P.C. Art. 1634, subdiv. 1 and 2.)

(3) two or more persons to agree to boycott, or not to deal with, the tangible personal property of another person; or (R.S. Art. 7428, subdiv. 3 (part), amd. by 50th Legis., Ch. 310, Sec. 1; P.C. Art. 1634, subdiv. 3 (part), amd. by 50th Legis., Ch. 309, Sec. 1.)

(4) an employer and labor union or other organization to agree or combine so that

(A) a person is denied the right to work for an employer because of membership or nonmembership in the labor union or other organization; or

(B) membership or nonmembership in the labor union or other organization is made a condition of obtaining or keeping a job with the employer. (R.S. Art. 7428–1.)

(b) It is not a conspiracy in restraint of trade for

(1) employees to agree to quit their employment, or to refuse to deal with tangible personal property of their immediate employer, unless their refusal to deal with tangible personal property of their immediate employer is intended to induce, or has the effect of inducing, that employer to refrain from buying or otherwise acquiring tangible personal property from a person; or (R.S. Art. 7428, subdiv. 3 (part), amd. by 50th Legis., Ch. 310, Sec. 1; P.C. Art. 1634, subdiv. 3 (part), amd. by 50th Legis., Ch. 309, Sec. 1.)

(2) persons to agree to refer for employment a migratory farm worker who works on seasonal crops if the referral is made irrespective of whether or not the worker belongs to a labor union or other organization. (52nd Legis., Ch. 494, Sec. 2.)

Acts 1967, 60th Leg., vol. 2, p. 2343, ch. 785, § 1.

§15.04. Monopoly, Trust, and Conspiracy in Restraint of Trade Prohibited; Agreement Violating Prohibition Void

(a) Every monopoly, trust, and conspiracy in restraint of trade, as defined in Sections 15.01, 15.02, and 15.03 of this code, respectively, is illegal and prohibited. (R.S. Art. 7429.)

(b) An agreement violating the prohibition against a monopoly, trust, or conspiracy in restraint of trade contained in Subsection (a) of this section is void and unenforceable in law or equity. (R.S. Art. 7437.)

Acts 1967, 60th Leg., vol. 2, p. 2343, ch. 785, § 1.

§15.33. Criminal Penalties

(a) A person may not agree to form, form, be a party to the formation of, or aid a monopoly, trust, or conspiracy in restraint of trade, as defined in Sections 15.01, 15.02, and 15.03(a) (1)-(3) of this code, respectively. (P.C. Art 1637.)

(b) A person acting as a member, agent, employee, officer, director, or stockholder of a business, firm, corporation, or association may not

(1) sell, purchase, contract, do business or any other act for, or form or operate, the business, firm, corporation, or association in violation of the prohibition against a monopoly, trust, and conspiracy in restraint of trade, as defined in Sections 15.01, 15.02, and 15.03(a) (1)-(3) of this code, respectively; or

(2) in this state, with an intent to drive out competition or financially injure a competitor,

(A) sell a product below the cost of its manufacture or production;

(B) give away a product; or

(C) give a secret rebate on the sale price of a product. (P.C. Art. 1638.)

(c) A person who forms outside this state a monopoly, trust, or conspiracy in restraint of trade, as defined in Sections 15.01, 15.02, and 15.03(a) (1)-(3) of this code, respectively, may not, with respect to the monopoly, trust, or conspiracy in restraint of trade,

(1) cause or permit it to do business, operate, or have an effect in this state;

(2) aid it to do business in this state or otherwise violate the prohibition against a monopoly, trust, or conspiracy in restraint of trade, as defined in Sections 15.01, 15.02, and 15.03(a) (1)-(3) of this code, respectively; or

(3) buy, sell, or contract for it.

(P.C. Art. 1639 (part).)

(d) A person who violates a provision of Subsection (a), (b), or (c) of this section is guilty of a felony and upon conviction is punishable by imprisonment in the penitentiary for not less than 2 nor more than 10 years. (P.C. Art. 1639 (part).)

(e) A criminal prosecution under this section may be brought in Travis or any other county in which a monopoly, trust, or conspiracy in restraint of trade is allegedly

operating (P.C. Art. 1641.) Acts 1967, 60th Leg., vol. 2, p. 2343, ch. 785, § 1.

Texas Antitrust Statutes In Effect Prior To September 1, 1967

Art. 7426. [7796] "Trusts"

A "trust" is a combination of capital, skill or acts by two or more persons, firms, corporations or associations of persons, or either two or more of them for either, any or all of the following purposes:

1. To create, or which may tend to create, or carry out restrictions in trade or commerce or aids to commerce or in the preparation of any product for market or transportation, or to create or carry out restrictions in the free pursuit of any business authorized or permitted by laws of this State.

2. To fix, maintain, increase or reduce the price of merchandise, produce or commodities, or the cost of insurance, or of the preparation of any product for market or transportation.

3. To prevent or lessen competition in the manufacture, making, transportation, sale or purchase of merchandise, produce or commodities, or the business of insurance, or to prevent or lessen competition in aids to commerce, or in the preparation of any product for market or transportation.

4. To fix or maintain any standard or figure whereby the price of any article or commodity of merchandise, produce or commerce, or the cost of transportation, or insurance, or the preparation of any product for market or transportation, shall be in any manner affected, controlled or established.

5. To make, enter into, maintain, execute or carry out any contract, obligation or agreement by which the parties

thereto bind, or have bound themselves not to sell, dispose of, transport or to prepare for market or transportation any article or commodity, or to make any contract of insurance at a price below a common standard or figure or by which they shall agree in any manner to keep the price of such article or commodity or charge for transportation or insurance, or the cost of the preparation of any product for market or transportation at a fixed or graded figure, or by which they shall in any manner affect or maintain the price of any commodity or article or the cost of transportation or insurance, or the cost of the preparation of any product for market or transportation between them or themselves and others, to preclude a free and unrestricted competition among themselves or others in the sale or transportation of any such article or commodity, or business of transportation or insurance, or the preparation of any product for market or transportation, or by which they shall agree to pool, combine or unite any interest they may have in connection with the sale or purchase of any article or commodity, or charge for transportation or insurance or charge for the preparation of any product for market or transportation whereby its price or such charge might be in any manner affected.

6. To regulate, fix or limit the output of any article or commodity which may be manufactured, mined, produced or sold, or the amount of insurance which may be undertaken, or the amount of work that may be done in the preparation of any product for market or transportation.

7. To abstain from engaging in or continuing business, or from the purchase or sale of merchandise, produce or commodities partially or entirely within the State of Texas, or any portion thereof. Acts 1903 p. 119.

Art. 7427. [7797] "Monopoly" defined

A monopoly is a combination or consolidation of two or more corporations when effected in either of the following

methods:

1. When the direction of the affairs of two or more corporations is in any manner brought under the same management or control for the purpose of producing, or where such common management on control tends to create a trust as defined in the first article of this chapter.

2. Where any corporation acquires the shares or certificates of stock or bonds, franchise or other rights, or the physical properties or any part thereof, of any other corporation or corporations, for the purpose of preventing or lessening, or where the effect of such acquisition tends to affect or lessen competition, whether such acquisition is accomplished directly or through the instrumentality of trustees or otherwise. Id.

Art. 7428. [7798] Conspiracies against trade

Either or any of the following acts shall constitute a conspiracy in restraint of trade:

1. Where any two or more persons, firms, corporations or associations of persons, who are engaged in buying or selling any article of merchandise, produce or any commodity, enter into an agreement or undertaking to refuse to buy from or sell to any other person, firm, corporation or association of persons, any article of merchandise, produce or commodity.

2. Where any two or more persons, firms, corporations or associations of persons, shall agree to boycott or threaten to refuse to buy from or sell to any person, firm, corporation or association of persons for buying from or selling to any other person, firm, corporation or association of persons.

3. Where any two or more persons, firms, corporations or associations of persons shall agree to boycott, or enter into any agreement or understanding to refuse to transport, deliver, receive, accept, erect, assemble, operate, use

or work with any goods, wares, merchandise, articles or products of any other person, firm, corporation or association of persons; provided, however, that this subdivision of this Article shall not be construed to apply to an agreement between employees to terminate their employment, or to refuse to transport, deliver, receive, accept, erect, assemble, operate, use or work with the goods, wares, merchandise, articles or products of their immediate employer unless such refusal is intended or calculated to induce, or shall have the effect of inducing, such employer to refrain from purchasing or from otherwise acquiring goods, wares, merchandise, articles or products from any person, firm, corporation or association of persons. Acts 1903 p. 119; Acts 1947, 50th Leg. p. 530, ch. 310 § 1.

APPENDIX F

Texas Alcoholic Beverage Code

§102.51. Setting of Territorial Limits

(a) Each holder of a manufacturer's or nonresident manufacturer's license shall designate territorial limits in this state within which the brands of beer the licensee manufactures may be sold by general, local, or branch distributor's licensees.

(b) Each holder of a general, local, or branch distributor's license shall enter into a written agreement with each manufacturer from which the distributor purchases beer for distribution and sale in this state setting forth the nonexclusive territorial limits within which each brand of beer purchased may be distributed and sold. A copy of the agreement and any amendments to it shall be filed with the administrator.

(Effective September 1, 1975)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1876

DEL RIO DISTRIBUTORS, INC.,
Petitioner,

v.

ADOLPH COORS COMPANY,
Respondent.

BRIEF OF THE ADOLPH COORS COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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July 24, 1979

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QUESTION PRESENTED FOR REVIEW

Expressed in the circumstances of this case, the question presented should be whether in a federal question lawsuit, arising under the Sherman Act, a state statute or constitution should be applied as the rule of decision to determine whether the federal statute was violated.

STATEMENT OF THE CASE

The Respondent, Adolph Coors Company (Coors), deems the following additions to the statement of the

case necessary to correct inaccuracies in Del Rio's statement:

1. Del Rio erroneously characterizes the relationship between itself and Coors as an exclusive distributor arrangement. The contract between Coors and Del Rio stated on its face that the distributor relationship was a non-exclusive, personal right to wholesale Coors beer in Del Rio and surrounding counties. The agreement also provided that Coors, in its sole discretion, could appoint additional distributors to service particular accounts within the territory designated for Del Rio without consulting Del Rio.

2. Del Rio next asserts that it was restricted to wholesaling Coors beer within a designated territory and that when the territory finally became profitable Del Rio was terminated. The record is replete with uncontradicted evidence that Del Rio was plagued with managerial, organizational, and operational problems almost from the outset of its distributor relationship with Coors. The principals in the Del Rio distributorship were repeatedly advised, orally and in writing, of deficiencies in their operation. Problems cited, among others, were that the distributorship was overstaffed, inventory was not properly refrigerated or rotated, personnel were poorly trained and ineffective, and that the distributorship failed to control capital and overhead costs. In May, 1971, Del Rio was placed on probation and allowed 90 days in which to bring its operation up to standards satisfactory to Coors. When the deficiencies in operation were not corrected to Coors' satisfaction, Del Rio was terminated and given a reasonable period of time in which to sell the distributorship. The termination reflected nothing more than a business decision on the part of Coors to replace an unsatisfactory distributor.

3. Del Rio admits that its antitrust claim arising under the laws of the State of Texas was abandoned prior to trial but asserts that the claim was abandoned in order to "induce" Coors to enter into the pre-trial order dated February 25, 1977. This characterization is objectionable in view of the pre-trial order, which clearly reflects that Del Rio abandoned its state antitrust claim so that no "jurisdictional questions" would exist. Since the only jurisdictional question in Del Rio's Second Amended Complaint was whether the District Court had pendent jurisdiction over the state law claim, it is clear this was the jurisdictional question Del Rio intended to eliminate. That Del Rio intended to pursue only its federal claim is further indicated in the pre-trial order in the statement of contested issues which challenged the alleged trade restraints only on the ground that they violated the "antitrust laws of the United States."

ARGUMENT

This suit was brought under Section 1 of the Sherman Act, 15 U.S.C. § 1, and the Texas antitrust laws, alleging that Coors engaged in price fixing, imposed territorial restraints on distributors which were illegal per se, and wrongfully terminated Del Rio as its distributor. In the pre-trial order, Del Rio abandoned its state law claim and proceeded solely on its federal antitrust claims. Accordingly, no evidence was introduced relative to the state claims, and, in fact, the relevant state statutes and constitution were not included in the trial court record. During trial the decision in *Continental T.V., Inc. v. G.T.E. Sylvania,* 433 U.S. 36, 53 L.Ed.2d 568, 97 S.Ct. 2549 (1977), overruling *United States v. Arnold, Schwinn & Co.,* 388 U.S. 365, 18 L.Ed.2d 1349, 87 S.Ct. 1856 (1967), was issued by this Court. In view of

Continental T.V., Del Rio moved at the close of all the evidence to enlarge the pre-trial order asking the District Court to reinstate Del Rio's previously abandoned claim under the Texas antitrust law. Del Rio's motion and requested instructions, based on state law, were denied. The Court of Appeals upheld the trial judge's refusal to enlarge the pre-trial order noting that Del Rio did not request a continuance or additional time in which to present evidence under a rule of reason analysis as dictated by *Continental T.V.*, and that Del Rio failed to establish that the trial judge abused his discretion. Instead, Del Rio, relying on the doctrine of collateral estoppel, requested the District Court to enter judgment against Coors, as a matter of law, asserting that the issues litigated in this suit had been previously decided adversely to Coors in *Copper Liquor, Inc. v. Adolph Coors Company*, 506 F.2d 934 (5th Cir. 1975), and *Adolph Coors Company v. Federal Trade Commission*, 497 F.2d 1178 (10th Cir. 1974). However, the trial judge, who also presided in the *Copper Liquor* case, refused to apply collateral estoppel offensively on the issue of liability, and the Court of Appeals also held that collateral estoppel had no application in this case.

Del Rio contends in this Petition that the Court of Appeals should have directly addressed the question of whether state antitrust law determines the legality of a vertically imposed territorial limitation in a Sherman Act case and by failing to do so, ignored an important question of law. The Court of Appeals, in fact, answered the question in its holdings that Del Rio "clearly waived any claim it might have had under Texas antitrust law" and that the District Court did not abuse its discretion in refusing to modify the pre-trial order (after trial) to

reinstate Del Rio's previously abandoned state claim based on Texas antitrust law.

As the plaintiff in this suit, Del Rio weighed its causes of action, whether they arose under federal or state statute, or both, selected its forum, and finally tried the suit as one arising under the Sherman Act. Del Rio cannot now complain because, in retrospect, the state law claim might have been successful. The District Court properly exercised its discretion in refusing to modify the pre-trial order, and the Court of Appeals properly affirmed that exercise of judicial discretion. Coors submits there is no important question of law to be considered, and there is no other basis for invoking this Court's jurisdiction to review the Court of Appeal's judgment on writ of certiorari. Therefore, Del Rio's petition should be denied.

The questions presented by Del Rio in this Petition for Certiorari are whether a trade restraint which allegedly constitutes a felony violation of state law is also unlawful as a matter of law under the Sherman Act; and whether federal antitrust law preempts state antitrust law. (Del Rio's Petition, p. 2, fn. 1). These are the only questions for consideration. *Alice State Bank v. Houston Pasture Co.*, 247 U.S. 240, 62 L.Ed. 1096, 38 S.Ct. 496 (1918); *Mayor v. Educational Equality League*, 415 U.S. 605, 623, 39 L.Ed.2d 630, 94 S.Ct. 1323 (1974).

I. TEXAS STATUTES AND CONSTITUTION AS RULES OF DECISION

Even though the jurisdiction of the District Court was invoked based on the existence of a federal question, and the case was tried under the federal antitrust laws, alleging claims arising out of violations of federal statutes,

Del Rio contends that the Texas antitrust law and constitution "must predominate" over federal law and antitrust policy on the issue of liability. Del Rio contends that the Court of Appeals failed to address an important question of law and ignored Del Rio's primary argument on appeal. Specifically, Del Rio contends that the imposition of exclusive vertical territorial restraints constitutes a felony in Texas; therefore, "Texas antitrust laws must predominate so as to render these [vertical territorial] restrictions unreasonable and illegal per se under the Sherman Act." (Del Rio's Petition, p. 10).

It is clear, however, that where an act of Congress provides the rule of decision it must be applied regardless of state law. *See, Erie R. Co. v. Tompkins*, 304 U.S. 64, 78, 82 L.Ed. 1188, 58 S.Ct. 817 (1938); *D'Oench Duhme & Co. v. Federal Deposit Insurance Corp.*, 315 U.S. 447, 471-472, 86 L.Ed. 956, 62 S.Ct. 676 (1942) (Jackson, J., concurring opinion); *United States v. Standard Oil Co.*, 332 U.S. 301, 307, 91 L.Ed. 2067, 67 S.Ct. 1604 (1947); Rules of Decision Act, 28 U.S.C. § 1652 (1948). Similarly, where a substantive federal policy has developed, or where decisional law suggests uniformity of enforcement, overriding federal interests dictate that federal rather than state law controls. *See, Sola Electric Co. v. Jefferson Electric Co.*, 317 U.S. 173, 176-177, 87 L.Ed. 165, 63 S.Ct. 172 (1942); *Burks v. Lasker*, ___ U.S. ___, 60 L.Ed.2d 404, 411-412, ___ S.Ct. ___ (1979). Notwithstanding Del Rio's assertion that the challenged vertical restraints were wholly intrastate—which was not raised below—the record in this suit is almost exclusively federal. Del Rio's abandonment of its claim arising under state law and its statement of the contested issues in the pre-trial order clearly demonstrate that the case turned on federal rather

than state law. Essentially, Del Rio asks that years of litigation, in which the parties proceeded assuming a federal law issue, be ignored and this case relitigated on a state law claim. Clearly, relitigation should not be commenced in this or any case merely on the chance that a pendent state claim might have merit. *See, Mayor v. Educational Equality League, supra,* at 624-629.

Del Rio raised both federal and state private causes of action in its amended complaint but subsequently abandoned the state cause of action during the pre-trial conference held after the completion of all discovery. According to statements in its Petition, Del Rio voluntarily elected to pursue only its federal cause of action in part because of the lure of treble damages and in part because it believed nothing could be gained pursuing the state claim. (Del Rio's Petition, p. 4, fn. 2). Del Rio's abandonment of its state claim was a voluntary waiver of a known right with full knowledge of the relative merits of the two claims. Del Rio was fully aware of the consequences of its waiver, or should have been aware of the consequences, thus the trial judge properly refused to enlarge the pre-trial order and reinstate the state claim after the close of all the evidence.

Moreover, state law as an alternative rule of decision, may not be dispositive of Del Rio's claim that vertical territorial restraints are illegal as a matter of law. The Texas cases cited by Del Rio may be characterized as supporting the general rule that contracts imposing exclusive territorial restrictions on distributors violate Texas antitrust law and are, therefore, unenforceable. State decisional law recognizes, however, a manufacturer's right to sell to whomever he pleases and his right to choose the number of distributors—one, two, or more—he will place in a particular area. *Sherrard v. After*

Hours, Inc., 464 S.W.2d 87 (Texas, 1971). With regard to exclusive territories, the Texas Supreme Court, in *Sherrard*, held that a contract by which a supplier binds himself to sell to only one distributor for an exclusive territory violates the antitrust laws of Texas and is unenforceable. In this suit, however, the contract between Coors and Del Rio states, on its face, that the distributor relationship is non-exclusive and that Coors may appoint other distributors to sell in Del Rio's territory. Thus, the vertical trade restraints alleged by Del Rio may not fall within the prohibition of Texas antitrust law as Del Rio has asserted.

Finally, Del Rio's contention that state law determines whether vertically imposed trade restraints violate the Sherman Act contravenes this Court's holding in *Continental T.V.* that any departure from the rule of reason standard in analyzing vertical restrictions must be based upon demonstrable economic effects. Clearly a state rule of decision, which is inconsistent with the rule of *Continental T.V.*, should not be applied to determine liability in a federal question case involving vertical trade restrictions.

Regardless of whether state law is dispositive of any issues in this case, which Coors does not admit, Del Rio's state law claim was clearly abandoned by counsel prior to trial. The claim was abandoned at a time when Del Rio could weigh the relative merits of the claims and their respective proofs. Essentially, Del Rio asks to be relieved of its decision abandoning the state claim, because, in retrospect, Del Rio now believes that claim has merit. Clearly this is not a proper ground for requesting certiorari.

II. PREEMPTION OF STATE LAW

Del Rio misrepresents an argument presented by Coors in the Court of Appeals. Del Rio asserts that its state antitrust claim is not preempted by federal antitrust law but that Coors argued otherwise in the Court of Appeals. In fact, Coors argued that the questions of federal preemption and whether state antitrust law should be applied in a Sherman Act suit were not properly before the Court of Appeals, because Del Rio had abandoned its state law claims prior to trial.

As in the Court of Appeals, the question of whether Texas antitrust law is preempted by federal antitrust law is again presented by Del Rio. Whether or not the doctrine of federal preemption applies is not dispositive of this suit. Had Del Rio not abandoned its state claim, the District Court would have determined whether it was proper to decide the pendent state claim, but the necessity of making that determination was eliminated by Del Rio's election not to proceed on the state claim. Significantly, Del Rio did not have an absolute right to have its pendent state claim resolved by the District Court. Pendent jurisdiction is a doctrine of discretion not of plaintiff's right and involves considerations of judicial economy, convenience, and fairness. *United Mine Workers v. Gibbs*, 383 U.S. 715, 726, 16 L.Ed.2d 218, 86 S.Ct. 1130 (1966). Absent a showing by Del Rio of an abuse of judicial discretion by the trial judge or manifest injustice, the Petition for Writ of Certiorari should be denied.

This is a case where the plaintiff was well aware of the nature of his federal and state claims, the relative importance of each, and the proofs necessary to establish each claim. With full knowledge of the importance of each of these claims, Del Rio abandoned its pendent

state claim and proceeded to trial solely on the federal claim. Even though Del Rio now senses there might be something to be gained by pursuing the state claim, it should not be relieved of the consequences inherent in its pre-trial election absent a showing of manifest injustice or an abuse of judicial discretion.

CONCLUSION

The Petitioner has failed to demonstrate any basis in fact or in law to invoke this Court's jurisdiction to review the judgments below on writ of certiorari. Therefore, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

BRADLEY, CAMPBELL & CARNEY
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By _____

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July 24, 1979

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1876

DEL RIO DISTRIBUTORS, INC., *Petitioner,*

vs.

ADOLPH COORS COMPANY, *Respondent.*

REPLY BRIEF OF DEL RIO DISTRIBUTORS, INC., TO BRIEF OF THE ADOLPH COORS COMPANY IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

IN THE

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Petitioner, Del Rio Distributors, Inc. (Del Rio), files this reply brief to respond to certain arguments and statements contained in the brief submitted by Respondent, Adolph Coors Company (Coors).

STATEMENT OF THE CASE

1. Coors states that Del Rio has erroneously characterized itself as Coors' exclusive distributor in its designated territory, referring to wording in Coors' distributorship agreement, giving Coors the right to appoint additional distributors within the designated

territory. However, the fact remains that throughout the time Del Rio acted as Coors' distributor, Del Rio was the only Coors distributor located in or functioning in such territory, making it, in fact, the exclusive distributor for Coors in that territory.

2. Coors asserts that managerial problems existed in Del Rio's distributorship, which warranted its termination; nevertheless, Del Rio was terminated at a time when its sales had reached an all-time high and it had first begun to turn a profit.

ARGUMENT

I. Del Rio's Claim Asserted Here Is Exclusively Federal

Del Rio is not here seeking to assert a pendant claim under the Texas statutes. It is not asking that the federal issue be ignored and the case be re-litigated on state law, as Coors asserts at page 7 of its brief. Not since the trial judge refused Del Rio's request to enlarge the pre-trial order, to reassert its pendant claim under the state statutes, has Del Rio sought any relief under state law. The relief sought is wholly under Section 1 of the Sherman Act and the question before this Court is the effect of the Texas antitrust prohibition against vertical territorial restraints upon the rule of reason under the Sherman Act. Del Rio is not seeking to enshrine state law over federal law but is rather insisting that the state law and policy must constitute the overriding circumstance in determining the Sherman act rule of reason question. Del Rio says simply that a restriction on trade and commerce that constitutes a felony where committed, cannot be deemed reasonable.

Nor does the fact that Del Rio waived its pendant claim under the Texas act lessen the effect of such act upon the rule of reason determination under the Sherman Act, and the court of appeals holding that Del Rio waived its claim under the Texas antitrust law does not meet the question of what effect the Texas law has upon the reasonableness of the trade restriction under the federal act.

Coors asserts that Del Rio produced no evidence relative to a violation of Texas law and that the state statutes and constitution were not included in the trial record. However, the only evidence required of a violation of the state law is the fact of the territorial restriction, admitted by Coors; and Del Rio, by trial brief, brought to the trial court's attention the Texas law condemning the same.

II. Texas Law Clarly Condemns Coors Vertical Territorial Restrictions

In its brief, Coors has attempted to obscure Texas' antitrust prohibition against vertical territorial restrictions by cloaking over it, Texas' further and additional antitrust prohibition against the granting of exclusive territories to a distributor. Under Texas law, both practices are condemned and it is a violation of the Texas antitrust law to *either* impose territorial restrictions on a purchaser, or grant an exclusive territory, and the proscription of territorial restrictions is independent and separate from Texas law's condemnation of exclusive territories. To do either violates the Texas antitrust law.

CONCLUSION

Del Rio prays that its petition for a writ of certiorari be granted.

Respectfully submitted,

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